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OFFICE OF THE
SECRETARY
U.S. DEPARTMENT OF
TRANSPORTATION

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY

Complainant.

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42125

MOTION TO COMPEL OF NORFOLK SOUTHERN RAILWAY COMPANY

Pursuant to 49 C.F.R. §1114.31(a), Defendant Norfolk Southern Railway Company ("NS") hereby moves for an order to compel Complainant E.I. DuPont de Nemours and Company ("DuPont") to respond to NS's Request For Production Number 20 ("NS RFP 20").¹ NS RFP 20 asks DuPont to produce documents related to claims that DuPont made in a civil lawsuit against NS in which one of the elements of DuPont's claimed damages was the cost of DuPont's use of transportation alternatives to NS rail service. As such, NS RFP 20 is directly relevant to the threshold jurisdictional question of qualitative market dominance, which asks whether DuPont can demonstrate "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). Indeed, DuPont *admits* that it has potentially responsive documents in its control, and claims only (1) that in DuPont's opinion the alternative transportation for which it claimed damages in prior litigation did not constitute effective competition under § 10707(a); and (2) that producing the responsive documents that DuPont has identified would be unduly burdensome. In the

¹ Exhibit A is a copy of NS's Request for Production Number 20. Exhibit B contains DuPont's objections to NS RFP 20.

context of a Stand Alone Cost case involving 146 lanes of traffic and in which DuPont has posed over 900 discovery requests (including subparts) to NS, DuPont's refusal to produce these plainly relevant documents cannot stand.

I. BACKGROUND

Under the Interstate Commerce Act, the Board's jurisdiction to consider a rate reasonableness complaint requires a determination that the carrier has market dominance over the traffic at issue. 49 U.S.C. § 10707(b), (c). Market dominance has both a quantitative and qualitative component; the qualitative component is defined in the statute as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). In recent cases the Board has recognized the critical importance of the qualitative market dominance threshold and has carefully examined whether or not complainants have "feasible transportation alternatives that could be used for the issue traffic." *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, S.T.B. Docket No. NOR 42121 (served Apr. 5, 2011) at 3 (granting motion to expedite consideration of market dominance) ("*TPI v. CSXT*"); see also *Seminole Elec. Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. Ex Parte 693 (May 19, 2010) (order granting oral argument solely devoted to qualitative market dominance).

Indeed, in recent cases in which there has been a substantial showing of feasible transportation alternatives, the Board has bifurcated the litigation because it recognizes that determining the moves over which it has jurisdiction is an important threshold question. See *TPI v. CSXT* at 7 (ordering bifurcation of the proceeding). Accordingly, it is equally important for complainants like DuPont to produce directly relevant information regarding market dominance in a timely fashion.

Both NS and DuPont have posed multiple discovery requests relating to the critical question of market dominance, including the extent to which DuPont has used alternative forms of transportation (such as barges, trucks, or rail-truck transloading) to transport the issue commodities. NS's market dominance-related requests included RFP 20, which requests that DuPont:

Produce all documents, including contracts, studies, analyses, and communications, referring or relating to DuPont's use of Alternative Transportation as claimed by DuPont in its complaint filed against NS on September 1, 2000 in the United States District Court for the Eastern District of Virginia in docket no. 00-cv-1489, including but not limited to documents concerning DuPont's claims in that case that it "secur[ed] substitute rail transportation"; "secur[ed] transportation by other modes, including truck and barge"; "modif[ied] its facilities to accommodate new modes of transportation"; and "intall[ed] additional loading and unloading equipment."

The litigation referenced in NS RFP 20 was a federal civil action in which DuPont asserted claims against NS predicated on alleged service problems in the wake of the NS/CSXT acquisition of Conrail. DuPont claimed that it had used alternatives to NS rail service as a result of these alleged service problems and that DuPont was entitled to recover the costs of those transportation alternatives as damages from NS. DuPont's admitted use of transportation alternatives in this prior federal court litigation is highly relevant to the instant rate reasonableness case, and particularly to whether DuPont has access to effective competitive alternatives to NS rail service for some or all of the 146 lanes at issue.

DuPont initially objected to NS RFP 20 on the grounds that it was "overbroad and irrelevant because it seeks information on transportation options used by DuPont in a unique and extreme situation that occurred over a decade ago." *See* Ex. B at 47. In its initial response, DuPont claimed that it "is not in possession of responsive documents." *Id.* (emphasis added). DuPont tellingly did not comment upon any documents that might be in its "control." NS

reminded DuPont that the Board's rules require production not only of responsive documents in its "possession," but also documents in its "custody or control." 49 C.F.R. 1114.30(a)(1); *see* Ex. C at 5 (M. Warren letter to J. Moreno (Mar. 3, 2011)). After a face-to-face meeting between the parties' representatives to discuss discovery responses, DuPont agreed to ask the outside counsel that represented DuPont in the earlier litigation to identify any responsive documents in that counsel's files. On April 11, 2011, DuPont informed NS that its former counsel had over 100 boxes of documents, and that DuPont was refusing to produce responsive documents on the ground that in DuPont's opinion the documents regarding DuPont's use of transportation alternatives did not demonstrate effective competitive alternatives and that reviewing those files would be unduly burdensome.

II. ARGUMENT

The Board "grant[s] reasonably drawn discovery requests" in Stand-Alone Cost ("SAC") cases. *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985) ("*Guidelines*"). Under 49 C.F.R. §1114.21, "[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding." Here, NS's narrowly tailored request for documents related to DuPont's use of alternative transportation—a use that DuPont was willing to rely upon in federal court in an effort to obtain damages from NS—is plainly relevant and not unduly burdensome.

A. DuPont's Use of Alternative Transportation is Relevant to Qualitative Market Dominance

The core of the qualitative market dominance inquiry is "whether there are feasible transportation alternatives that could be used for the issue traffic." *TPI v. CSXT* at 4 (*citing E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42099, slip op. at 2 (served June 30, 2008)). And, as the Board has recently recognized, whether a complainant has

actually used an alternative to rail service to transport an issue commodity is highly relevant to whether that alternative is feasible and effective competition. *See TPI v CSXT* at 6 (holding that the use of alternative transportation methods “increases the likelihood that [the carrier] faces effective competition for that traffic”). In the instant SAC case, in which DuPont has challenged 146 separate lanes of varying lengths and involving dozens of different commodities, information about DuPont’s prior utilization of alternatives to rail transportation is highly relevant. NS RFP 20’s request for documents related to alternative transportation modes used by DuPont is therefore plainly relevant to whether effective competition might exist.

DuPont claims that the use of competitive alternatives that it relied upon to increase its damages claim in the federal court litigation need not be produced in this litigation because that use was allegedly caused by a “unique and extreme situation.” *See* Ex. D at 1 (Letter from J. Moreno to P. Hemmersbaugh (April 11, 2011)). But that is an argument about the merits, not about discoverability. DuPont is free to argue that the Board should give less weight to DuPont’s prior utilization of transportation alternatives. But it is not free to refuse to produce relevant records altogether and thereby deprive NS and the Board from making their own judgments about the effect that DuPont’s use of alternative transportation has on market dominance.

B. NS’s Request Does Not Impose an Undue Burden on DuPont

DuPont’s objection to this request as being unduly burdensome is similarly meritless. NS RFP 20 is narrowly focused upon documents that are directly relevant to market dominance. NS has not requested all documents that DuPont has in its control resulting from the federal court litigation, and is not asking that DuPont produce all 100 boxes of documents. Rather, NS’s request is limited to documents “concerning DuPont’s claims in that case that it ‘secur[ed]

substitute rail transportation’; ‘secur[ed] transportation by other modes, including truck and barge’; ‘modif[ied] its facilities to accommodate new modes of transportation’; and ‘intall[ed] additional loading and unloading equipment.’” *See* Ex. A at 26. This request is narrowly tailored to documents that could provide evidence relating to DuPont’s use of alternative transportation and is not overbroad. *See Guidelines*, 1 I.C.C.2d, at 548.

[Don’t presume]Moreover, DuPont’s claim that it would “incur considerable expense to engage its former counsel to spend innumerable hours to carefully review over 100 boxes of vintage documents of highly questionable relevance for privileged information” is nonsense. *See* Ex. D at 2. If DuPont does not want to engage its former counsel to review these files, it need not do so. A client has a right to retrieve both originals and copies of documents in the possession of its lawyer relating to representation of the client. *See* Restatement (Third) of The Law Governing Lawyers §46(3) (2000). While DuPont’s outside counsel may currently have custody of the documents, DuPont, as the client, has the right to “retrieve, inspect, and copy” them. *See id.* Comment C. It is entirely within DuPont’s discretion whether it hires its former counsel, uses its counsel in this matter, uses other outside counsel, or reviews these documents with in-house DuPont personnel.²

Finally, reviewing 100 boxes of files is not a significant burden in the context of a SAC case. The Board has recognized that SAC cases “may require substantial discovery to litigate” and has stated that it is “prepared to make that discovery available.” *Guidelines*, 1 I.C.C.2d at 548. In this particular SAC case, DuPont has posed over 900 discovery requests (including subparts) to NS. Hundreds of NS personnel are spending thousands of person-hours to develop

² NS RFP 20 is not intended to reach information protected by the attorney client privilege or attorney work product doctrine. Rather, what NS RFP 20 seeks is the factual support for DuPont’s claims in the federal court litigation relating to its use of alternatives to NS rail service. That factual support is not privileged.

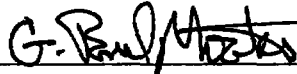
discovery responses. DuPont cannot pose this kind of extensive discovery and then subsequently claim that it is too burdensome for it to spend time reviewing documents that admittedly may contain responsive material.

III. CONCLUSION

For the foregoing reasons, NS respectfully requests that the Board order DuPont to respond to NS's Request for Production Number 20.

Respectfully submitted,

John M. Scheib
David I. Coleman
Christine Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

A handwritten signature in black ink, appearing to read "G. Paul Moates", is written over a horizontal line.

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Hanna M. Chouest
Marc A. Korman
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Counsel to Norfolk Southern Railway Company

Dated: April 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2011, I caused a copy of the foregoing Motion to Compel to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno
Sandra L. Brown
Jason Tutrone
Thompson Hine LLP
1920 N Street. NW, Suite 800
Washington, DC 20036


Eva Mozena Brandon

EXHIBIT A

EXHIBIT A

Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents
(dated December 2, 2010).

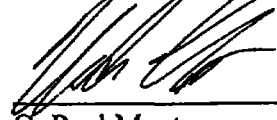
Request for Production 18. Produce all videos and other documents regarding policies, procedures, and practices for safe and/or secure handling of DuPont products, including the Issue Commodities.

Request for Production 19. Produce all videos and other documents showing or concerning loading and/or unloading operations for any transportation mode at any Issue Facility.

Request for Production 20. Produce all documents, including contracts, studies, analyses, and communications, referring or relating to DuPont's use of Alternative Transportation as claimed by DuPont in its complaint filed against NS on September 1, 2000 in the United States District Court for the Eastern District of Virginia in docket no. 00-cv-1489, including but not limited to documents concerning DuPont's claims in that case that it "secur[ed] substitute rail transportation"; "secur[ed] transportation by other modes, including truck and barge"; "modif[ied] its facilities to accommodate new modes of transportation"; and "intall[ed] additional loading and unloading equipment."

Request for Production 21. Produce all documents, data, or information identified or referenced in your responses to NS's Interrogatories, and all documents or other information you reviewed, consulted, considered, or relied upon in developing or preparing those responses.

Respectfully submitted,



G. Paul Moates
Terence M. Hynes
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Noah A. Clements
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John M. Scheib
David L. Coleman
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Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel to Norfolk Southern Railway Company

Dated: December 14, 2010

EXHIBIT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY)	
)	
Complainant)	
v.)	Docket No. NOR 42125
)	
NORFOLK SOUTHERN RAILWAY COMPANY)	
)	
Defendant)	
)	

**OBJECTIONS AND RESPONSES TO DEFENDANT'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

Complainant, E.I. DuPont de Nemours & Company ("DuPont"), hereby submits its Objections and Responses to the First Set of Interrogatories and Requests for Production of Documents to Defendant, Norfolk Southern Railway Company ("NS"). DuPont's responses to the Interrogatories and Requests for Production are based upon information presently known. Because DuPont continues to investigate the facts and information relating to the issues in this case, DuPont reserves the right to modify and/or supplement any of its responses as the existence of additional responsive information becomes known.

The following General Objections, Objections to Definitions, and Objections to Instructions are incorporated into the specific response and/or objection to each Interrogatory and Request for Production of Documents.

GENERAL OBJECTIONS

1. DuPont objects to each Interrogatory and Request for Production to the extent that it seeks information protected from disclosure by any applicable privilege, quasi-privilege, doctrine, or any other protection from discovery or disclosure, including, but not limited to, the attorney-client privilege and the attorney work-product doctrine. Any production of privileged

Request for Production 20. Produce all documents, including contracts, studies, analyses, and communications, referring or relating to DuPont's use of Alternative Transportation as claimed by DuPont in its complaint filed against NS on September 1, 2000 in the United States District Court for the Eastern District of Virginia in docket no. 00-cv-1489, including but not limited to documents concerning DuPont's claims in that case that it "secur[ed] substitute rail transportation"; "secur[ed] transportation by other modes, including truck and barge"; "modif[ied] its facilities to accommodate new modes of transportation"; and "intall[ed] additional loading and unloading equipment."

Response. DuPont objects to this RFP to the extent it requests documents that are privileged or otherwise protected from discovery. DuPont objects to this RFP as overbroad and irrelevant because it seeks information on transportation options used by DuPont in a unique and extreme situation that occurred over a decade ago. Subject to and without waiving any of its General Objections, Objections to Definitions, Objections to Instructions, or specific objections, DuPont responds that it is not in possession of responsive documents.

Request for Production 21. Produce all documents, data, or information identified or referenced in your responses to NS's Interrogatories, and all documents or other information you reviewed, consulted, considered, or relied upon in developing or preparing those responses.

Response. DuPont objects to this RFP as being duplicative of other discovery requests and to the extent it calls for the production of documents that are privileged or protected from discovery.

Respectfully submitted,

/s/ Sandra L. Brown
Jeffrey O. Moreno
Sandra L. Brown
David E. Benz
Jason D. Tutrone
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

February 2, 2011

EXHIBIT C

March 3, 2011

By Electronic Mail and Hand Delivery

Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036

Re: *E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42125

Dear Jeff:

We write on behalf of Norfolk Southern Railway Company ("NS") regarding the Objections and Responses of E.I. du Pont de Nemours & Company ("DuPont") to Defendant's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents ("Discovery Responses"), served February 2, 2011. We are writing to express several questions and concerns raised by some of the objections asserted by DuPont. We look forward to cooperating with you to resolve these questions and concerns without the need to burden the Board with discovery motions, and hope to resolve many, if not all, of these issues at our meeting tomorrow.

This letter does not catalog every instance where there is ambiguity in DuPont's response or where NS disagrees with one of DuPont's objections or responses. Instead, this letter focuses on the most significant questions arising from DuPont's Discovery Responses. NS reserves its rights to address additional concerns with DuPont's Discovery Responses and production at a later date. In addition, for the many responses where DuPont has promised to produce responsive documents or information, NS will reserve judgment on the adequacy of DuPont's response until it has an opportunity to review the documents DuPont has promised. NS notes that DuPont has yet to produce a single document in response to the Discovery Requests that NS posed two-and-a-half months ago.

1. General Objection 10

DuPont has objected to producing any information related to the transportation of an Issue Commodity "in less than bulk quantities." But DuPont has not explained the extent to which DuPont transports any Issue Commodity in less than bulk quantities or what "transportation characteristics" make DuPont's transportation of less-than-bulk shipments of Issue Commodities so irrelevant to bulk shipments as to justify DuPont's objection to producing any information about less-than-bulk shipments. Please explain what information DuPont is

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withholding due to this objection and the basis for DuPont's claim that this information is not discoverable.

2. General Objection No. 11 (Time Frame)

DuPont has objected to producing any responsive information related to its use of alternative transportation prior to January 1, 2008 on the ground that requests for pre-2008 information is "overbroad" and "unduly burdensome." *See, e.g.,* DuPont Responses to Interrogatories 7, 8, 9, 10, 12. Curiously, DuPont has asserted this objection for a number of requests for which NS only asked for data after January 1, 2008. *See* NS Discovery Requests Instruction 15 ("Unless otherwise indicated, the time period covered by these Discovery Requests includes the period from January 1, 2008 through the present."). NS limited the vast majority of its discovery requests to post-2008 information, and it is not unduly burdensome for DuPont to produce information from 2006 and 2007 in response to the limited set of requests for which NS has requested pre-2008 information. For example, DuPont's actual use of alternative transportation for the Issue Commodities is extraordinarily relevant to the subject of market dominance, and its use of such transportation in 2006 and 2007 is just as relevant as any use since 2008. DuPont should produce pre-2008 information in response to the limited number of requests for which NS asked for such information, including Interrogatories 7 and 23 and Requests for Production 2 and 20.

3. Definition Objection 6

DuPont objects to NS's discovery requests to the extent they apply to DuPont's "affiliates, subsidiaries, the parent of DuPont, or other entities that do not produce the Issue Commodities in the United States." This objection is not well-founded. In a decision relied upon by DuPont when demanding discovery of NS, the Surface Transportation Board made clear that discovery may properly reach corporate affiliates of a litigant in a SAC case. *See Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42110 (served Feb. 17, 2009). To the extent that DuPont has corporate affiliates who are likely to have information or documents responsive to NS's discovery requests, information in the possession of those affiliates is plainly within DuPont's "possession, custody, or control."

4. Definition Objections 11 and 12

DuPont claims that NS's definition of Issue Origins and Issue Destinations is ambiguous because in some cases the origin or destination listed in the exhibits to DuPont's complaint is different from the point at which NS Rail service originates or terminates for movements. But NS's Discovery Requests clearly define Issue Origins to include both the points at which NS rail service commences for Issue Movements and the points listed in the origin columns of Exhibits A and B of the complaint. NS likewise defines Issue Destinations to include both the destinations in the complaint and the points where NS rail service for the movements terminates. Put differently, for joint-line movements in which the ultimate origin or destination listed in the

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complaint differs from the NS origin or destination, NS seeks responses for both the ultimate origin/destination and the NS origin/destination.

5. Interrogatories 1-4

For each of these requests, DuPont has claimed that NS's request is premature and has responded that it will provide responsive information "at the appropriate time." It is not clear when that time would be. Indeed, DuPont's response suggests that it may not be planning to provide any response until it files its evidence. Such a position would be unjustified. Each of these interrogatories, which ask DuPont to identify what evidence it has to support the market dominance allegations it has made in its complaint, is plainly appropriate discovery, and DuPont is required to respond to them. Please state when DuPont plans to provide substantive responses to these interrogatories.

6. Interrogatories 6-8

DuPont has objected to several interrogatories asking for information about transportation of the Issue Commodities "to the extent it demands information not related to the Issue Movements." But DuPont's use of alternative transportation for any movements of the Issue Commodities is highly relevant to market dominance questions, including the feasibility of alternative transportation for the Issue Movements. Please clarify the scope of documents DuPont intends to search for and produce in response to these requests.

7. Interrogatories 17 and 18

These interrogatories request DuPont to state whether it contends that the Issue Rates will materially affect the operations, profitability, or viability of, or cause the closure of, any DuPont Production Facility. DuPont refuses to answer these interrogatories, claiming that they are irrelevant. However, in a previous SAC case DuPont sought preliminary injunctive relief from the STB claiming that challenged rates should be enjoined because they threatened the economic viability of a plant or facility. These interrogatories are plainly relevant to any similar allegations or request for relief that DuPont may submit. If DuPont pledges not to file a petition or other request for injunctive or other preliminary remedy concerning the challenged rates, and not to allege the challenged rates threaten the economic viability of facilities or operations of DuPont or any of its customers, NS will withdraw Interrogatories 17 and 18. Otherwise DuPont is obliged to provide full, substantive answers.

8. Interrogatory 27

Interrogatory 27 requests information in DuPont's possession, custody, or control related to competing or substitute products that could replace the Issue Commodities. Such information is highly relevant to establishing projected future volumes of the Issue Commodities. For example, evidence that DuPont's sales of some or all of the Issue Commodities are subject to vigorous competition from other sellers of the Issue Commodities (or sellers of products that

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could be substituted for the Issue Commodities) would be relevant to analysis of projections of the future volumes of Issue Movements. Moreover, DuPont's statement that responsive information would be "in the possession, custody or control of third parties" is not a permissible or adequate basis for refusing to search for and produce responsive information. DuPont is required to produce information in its possession, custody or control, and the possibility that third parties also might have responsive information is not relevant to DuPont's discovery obligations.

9. Interrogatories 31 and 32

Interrogatories 31 and 32 request information on other (non-issue) products, materials, or commodities that DuPont produces or receives at facilities that are origins or destinations for Issue Movements, and specifically for information on transportation arrangements that DuPont has made for such commodities. The transportation arrangements that DuPont has made for non-issue commodities originating at the same facilities at which Issue Movements originate (or being delivered to the same destinations as Issue Movements) are highly relevant to assessing the feasibility of alternative transportation for the Issue Movements. Please clarify whether DuPont will respond to this request.

10. Interrogatory 33

Interrogatory 33 requests information on DuPont studies of the development or potential development of transportation infrastructure. DuPont has objected, claiming that studies not related to the Issue Commodities, Issue Movements, and Issue Facilities are irrelevant. On the contrary, any DuPont studies related to the development of transportation infrastructure will be relevant to whether or not DuPont has the ability to develop transportation alternatives for the Issue Movements. The STB has made clear that a shipper's potential ability to develop a competitive alternative by making infrastructure investments can constitute effective competition pursuant to 49 U.S.C. § 10701(a). See *FMC Wyoming Corp. v. Union Pacific R.R. Co.*, 4 S.T.B. 699, 712-14 (2000).

11. Request for Production 5 & 6

Requests for Production 5 and 6 seek DuPont contracts or agreements with other rail carriers in effect since January 1, 2008. Such contracts are relevant not only for assessing DuPont's right to challenge joint line movements pursuant to the Board's *Bottleneck* exception, but also for assessing DuPont's potential transportation alternatives for the Issue Movements. Nevertheless, DuPont has claimed, without explanation, that contracts in effect before June 1, 2009 are irrelevant, and it has refused to produce them. In light of the transportation contracts' relevance to market dominance issues, NS reiterates its request that DuPont produce contracts in effect at any time between 2008 and 2010. Please state whether DuPont will produce transportation contracts, agreements, or arrangements in force at any time from 2008 through 2010.

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March 3, 2011
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12. Request for Production 20

DuPont's response indicates that it is "not in possession of responsive document." Regardless of whether DuPont has "possession" of responsive documents, if DuPont has "custody" or "control" of any responsive document or information, it must be produced. 49 C.F.R. § 1114.30(a)(1). This would include documents in the possession of DuPont's current and former counsel, consultants, or agents. Please clarify whether DuPont has any responsive documents in its custody or control. If so, those documents should be produced.

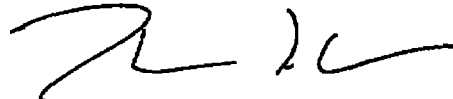
13. Interrogatories 7, 13, 20, 21, 23, 24, RFP 8

DuPont makes a series of objections to these requests, but states that it will produce responsive documents. Please clarify whether DuPont intends to withhold responsive documents based on its objections.

* * *

We look forward to our upcoming discovery conference and hope that we can resolve the parties' differences without the need to burden the Board with discovery motions. If you wish to discuss this letter before our meeting, please contact Paul Hemmersbaugh or me.

Sincerely,



Matthew J. Warren

cc: John Scheib

EXHIBIT D

April 11, 2011

By E-Mail and First Class Mail

Paul Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

**RE: E.I. du Pont de Nemours and Company v. Norfolk Southern Railway
Company, STB Docket No. 42125**

Dear Paul:

I am writing in follow-up to two matters concerning discovery by Norfolk Southern Railway Company ("NS") of E.I. du Pont de Nemours and Company ("DuPont").

The first matter concerns DuPont's production of information regarding historical truck shipments of the issue commodities. For three of the issue commodities, sulfuric acid, spent sulfuric acid, and polyethylene, DuPont has discovered a gap in its 2008 electronic shipment data. Specifically, for approximately 1700 out of 16,000 shipment records, the field that identifies the name of the customer that received those shipments is blank. All of the other fields (e.g., origin, destination, date, rates) for these shipments are populated and will be included in DuPont's production.

The second matter concerns DuPont's response to NS Request for Production ("RFP") No. 20. At our March 4, 2011 conference, DuPont agreed to confer with the outside counsel that represented DuPont in the complaint filed against NS on September 1, 2000 in the United States District Court for the Eastern District of Virginia, in Docket No. 00-CV-1489, to inquire whether that counsel has in its custody, possession, or control documents responsive to RFP 20. DuPont's counsel, CliffordChance, has informed DuPont that it has approximately 100 boxes of litigation files in storage. An additional 16 boxes were previously released to attorneys who departed CliffordChance for Kaye Scholer.

DuPont continues to assert its objections to RFP 20. This request is irrelevant and overbroad because it seeks information regarding transportation options that DuPont used in a unique and extreme situation that occurred over a decade ago, which was attributable to NS service failures arising from the acquisition and division of Conrail by NS and CSXT. The fact that those transportation alternatives cost DuPont so much extra money was the reason for DuPont's complaint, which sought restitution from NS. This was not a situation where DuPont exercised competitive options, but instead used far more expensive alternatives in order to mitigate even greater damages that would have resulted from shut downs due to NS service failures.

Jeff.Moreno@ThompsonHine.com Phone 202.263.4107 Fax 202.331.8330

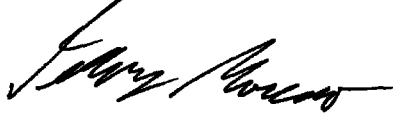
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April 11, 2011

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Moreover, it would be unduly burdensome for DuPont to produce this information. Because the information is in the possession of counsel and was generated in the course of litigation, it likely contains extensive attorney work product and attorney-client communications. DuPont would incur considerable expense to engage its former counsel to spend innumerable hours to carefully review over 100 boxes of vintage documents of highly questionable relevance for privileged information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno", written over a horizontal line.

Jeffrey O. Moreno